80-654

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JAMES B. GOWAN,

Petitioner,

-vs-

ST. FRANCIS COMMUNITY HOSPITAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA
PETITION OF DR. JAMES B. GOWAN

Counsel of Record
W. FRANCIS MARION
Post Office Box 2048
409 East North Street
Greenville, S. C. 29602
(803) 271-7970

HAYNSWORTH, PERRY, BRYANT,
MARION & JOHNSTONE
Greenville, S. C.
Of Counsel

QUESTION PRESENTED

DID THE SOUTH CAROLINA SUPREME COURT DENY PETITIONER HIS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN REFUSING TO REVIEW RESPONDENT'S DECISION TO DENY PETITIONER CERTAIN SPECIALIZED CLINICAL PRIVILEGES?

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CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, §1 .....3, 4, 5, 6, 7

OPINIONS BELOW

The Order of the South Carolina Supreme Court was handed down on July 24, 1980. This Order is appended hereto, *infra* at page 2-A. The case is officially reported in S. C. , 268 S.E.2d 580 (1980).The order of the trial court, not officially reported, is appended hereto, *infra* at page 4-A.

JURISDICTION

The Final Order of the South Carolina Supreme Court was handed down and filed on July 24, 1980, and entered August 6, 1980, and is appended hereto, *infra* at page 2-A. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution, the pertinent part of which is as follows:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

Petitioner, a physician, was admitted to the medical staff at Respondent hospital in 1958, and was granted unlimited privileges to interpret electrocardiograms (EKGs) and treat in the coronary care unit (CCU) there. He exercised those privileges without cirticism or censure until his temporary resignation from Respondent's Medical Staff in 1974. In 1977, Petitioner re-applied for admission to the staff of Respondent hospital and requested the EKG and CCU privileges he had previously enjoyed there. He was informed by the Assistant to the Medical Staff of Respondent hospital that his application would be a *re*-application.

The Credentials Committee of Respondent hospital granted Petitioner admission to the Medical Staff, and referred to the CCU Committee the question of EKG and CCU privileges.

Article 7, Section 1.c. of the Medical Staff Bylaws of Respondent hospital provides the following criteria for review of reapplications for clinical privileges:

> Period redetermination of clinical privileges and the increase or curtailment of same shall be based upon the direct observation of care provided, review of the records of patients treated in this or other hospitals, and review of the records of the medical staff which document the evaluation of the member's participation in the delivery of medical care.

Article 6, Section 1.b. of Respondent's Medical Staff Bylaws provides the following criteria for consideration of *initial* applications for staff appointment:

> Every initial application for staff appointment must contain a request for the specific clinical privileges desired by the applicant. The evaluation of such request shall be based upon the applicant's education, training, experience, demonstrated competence, references and other relevant information, including an appraisal by the clinical department in which such privileges are sought.

Respondent's Rules and Regulations delineating CCU and EKG privileges, drafted and adopted simultaneously with consideration of Petitioner's application, are as follows:

ELECTROCARDIOGRAPHY

(1) **Qualifications.** To qualify for the privilege of electrocardiographic interpretation, the members shall be Board Qualified or Board Certified by the American Board of Internal Medicine.

CORONARY CARE UNIT

II. ADMISSIONS AND TRANSFERS

a. Any staff members may admit patients to the Coronary Care Unit, but it is preferable and desirable that the admission be made by a member of the Division of Internal Medicine. If admission be made by a member of some other department or division, it is required that the patient be placed under the care of a member of the Division of Internal Medicine at once. The patient will be examined and orders written on admission to the unit.

b. Family Practice physicians shall be eligible for admission and treating privileges in Coronary Care Unit without obtaining consultation provided they present evidence of:

1. Having satisfactorily completed an approved three year Residency in Family Practice.
2. Completed during their Residency, a minimum of eight months in Internal Medicine.
3. Completed a minimum of two months with cardiologist(s) assigned primarily to a CCU during their Residency. Applicant must present a statement from the attending cardiologist(s) with whom he trained in these two months confirming this experience. This statement (or statements) shall include specific information regarding dates of training and all persons involved in supervision of the Resident. Furthermore, a concise evaluation of the Resident's ability to manage life sustaining equipment, drugs and total care of patients in a CCU setting shall be a part of this recommendation.

Although there was no criticism whatsoever of Petitioner's past performance in the two areas, the CCU Committee recommended that Petitioner not be granted EKG and CCU privileges because he did not meet the literal academic requirements set forth above. The Department of Medicine, the Credentials Committee, the Executive Committee and Ad Hoc Committee, and finally the Board of Managers of Respondent hospital affirmed the recommendation of the CCU Committee and denied Petitioner the two privileges, based not on documented experience and review of care provided, but on the single criterion of completion of academic requirements.

The trial court, in its decision filed on February 13, 1979, denied the injunctive relief sought by the Petitioner. The trial judge did not, however, consider the question of whether Petitioner's privileges had been denied by a procedure accomplished in accordance with Respondent's Bylaws.

Appellant in the South Carolina Supreme Court raised the Bylaws questions as Exceptions 3 and 4. The decision of the South Carolina Supreme Court filed July 24, 1980, did not consider the Bylaws questions, nor did it consider the question of whether Respondent's Rules and Regulations were arbitrary and capricious either *per se* or in their application to Petitioner. The per curiam decision merely stated that Respondent, as a private hospital, is free to adopt reasonable regulations for the conduct of its own affairs, and that such action is not subject to judicial review. This was not the position of the lower court, and the federal question did not surface until the decision of the South Carolina Supreme Court.

REASONS FOR GRANTING THE WRIT

The South Carolina Supreme Court's refusal to review Respondent hospital's decision to deny Petitioner certain specialized privileges denied Petitioner his rights under the Fourteenth Amendment to the United States Constitution.

The right to practice one's occupation is a constitutionally protected liberty interest. *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 572 (1972); *Shaw* v. *Hospital Authority of Cobb County*, 507 F. 2d 625, 628 (1975). While his right to practice his occupation has not been totally removed, Petitioner's deprivation is significant enough to rise to the level of constitutional recognition and protection. Indeed, since "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Board of Regents of State College* v. *Roth, supra*, at pg. 571, it is apparent upon consideration of the nature of the interest at stake and rejection of "the wooden distinction between 'rights' and 'privileges'," *Id.*, that Petitioner's interest in the specialized hospital privileges is itself a property interest within the Fourteenth Amendment's protection. Petitioner has a "legitimate claim of entitlement," *Id.*, at pg. 577, to the specialized privileges to which he is entitled pursuant to the legally binding terms of the contract between Petitioner and Respondent formed by the provisions of Respondent's Medical Staff Bylaws. *Berberian* v. *Lancaster Osteopathic Hospital Association*, 395 Pa. 257, 149 A. 2d 456 (1959); *Storrs* v. *Lutheran Hospitals and Homes Society of America, Inc.*, 609 P. 2d 24 (Alaska, 1980); Accord; *Ascherman* v. *St. Francis Memorial Hospital*, 45 Cal. App. 3d 507, 119 Cal. Rptr. 507 (1975); *Bricker* v. *Scheve Speare Memorial Hospital*, 111 N. H. 276, 281 A. 2d 589 (1971), *cert. denied*, 404 U.S. 995 (1971); *Adler* v. *Montefiore Hospital*, 453 Pa. 60, 311 A. 2d 634 (1973), *cert. denied*, 414 U.S. 1131 (1974). In addition, Petitioner has been deprived of the monies he would have earned by interpreting EKGs and treating patients in CCU, had the two privileges not been denied him. Petitioner, therefore, has been denied both liberty and property interests. *Suckle* v. *Madison General Hospital*, 362 F. Supp. 1196, 1209 (1973), *affirmed*, 499 F. 2d 1364 (1973); *Poe* v. *Charlotte Memorial Hospital*, 374 F. Supp. 1302, 1312 (1974).

It is elementary that the Fourteenth Amendment of the United States Constitution requires that a State give a party to a civil suit an opportunity for a meaningful hearing before he is deprived of any significant property or liberty interest. *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Armstrong* v. *Manso*, 380 U.S. 545, 552 (1965). This Court has stated, ". . . a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause." *Boddie* v. *Connecticut, supra*, at pg. 379. Petitioner is at least entitled to a post revocation determination consistent with the requirements of Fourteenth Amendment due process. See *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Dixon* v. *Love*, 431 U.S. 105 (1977); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

By its per curiam decision, the South Carolina Supreme Court has effectively denied to Petitioner a meaningful opportunity to be heard. That Court refused to look at any of the merits of the case, on grounds that the management decisions of private corporations are not subject to judicial review. This Court has long held, however, that where privately owned enterprises are "affected with the public interest", then that enterprise must submit to be controlled by the public for the common good, to the extent of the interest thus created. *Munn* v. *Illinois*, 94 U.S. 113, 126 (1876).

Respondent hospital is "affected with the public interest." Respondent's doors are open to all comers and services are dispersed on the premises. Respondent hospital's avowed basic purpose as stated in Article I, Section 2 of its Bylaws is "to provide hospital and medical care facilities and services for the benefit of the Greenville, South Carolina community without distinction as to race, color, creed, or national origin of its patients." Moreover, Respondent's links to both federal and state governments are particularly close. Funding for the construction of Respondent hospital was provided by the federal and state governments under two programs, the Hill-Burton Act and the Appalachian Development Act. Together, over $1,500,000.00 of such funding was

used. It has been held that receipt of such funding alone subjects a hospital to the obligations of the Fourteenth Amendment, and will sustain federal jurisdiction of a claim of denial of due process. *Christhilf* v. *Annapolis Emergency Hospital Ass'n, Inc.*, 496 F.2d 174, 178 (1974); *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515 (1974). Respondent hospital receives yearly substantial amounts of additional federal monies through Medicare and Medicaid. It was required to obtain a certificate of need from the State before its facilities could be built at all. And it is shielded from the buffetings of the free market place because any potential competitors must also obtain a certificate of need. Respondent also enjoys the advantages of federal and state tax exemption.

Petitioner did not argue that Respondent is not a private corporation. Rather, Petitioner argued that Respondent is a private corporation "affected with the public interest," such that judicial review of its management decisions is warranted. The South Carolina Supreme Court failed to deal with those arguments, however, and rigidly held that the internal management decisions of any private corporation are not subject to judicial review.

Pursuant to Exceptions 1 through 4, Petitioner argued to the South Carolina Supreme Court that:

1. Respondent's rules and regulations with respect to the delineation of CCU and EKG privileges are arbitrary and capricious on their face;
2. Respondent's rules and regulations with respect to delineation of CCU and EKG privileges were arbitrarily applied to Petitioner; and
3. the Petitioner's application for the privileges was not reviewed in accordance with Respondent's Bylaws.

The South Carolina Supreme Court's decision failed to address any of these arguments. Assuming that Petitioner has been injured by an arbitrary rule or the arbitrary application of

a rule or the failure of Respondent to follow its own Bylaws, he is thus left without a remedy. The South Carolina Supreme Court has effectively turned its head and refused to examine any internal management decision of Respondent hospital.

The South Carolina Supreme Court should have first determined whether or not Respondent hospital is a private corporation "affected with the public interest." If that decision were affirmative, it should then have examined the issues raised by Petitioner's Exceptions. Its failure to do either has deprived Petitioner of a meaningful opportunity to be heard to which he is entitled under the Fourteenth Amendment to the United States Constitution. See *Boddie* v. *Connecticut, supra.*

The South Carolina Supreme Court's refusal to judicially review Respondent's decision to deny Petitioner the specialized privileges violated Petitioner's Fourteenth Amendment rights by in effect denying him meaningful access to an impartial judicial determination of his cause, a fundamental requisite of due process. *Grannes* v. *Ordean,* 234 U.S. 385, 394 (1914).; *Silver* v. *Cormier,* 529 F.2d 161, 163 (1976). The federal constitutional right of access to court includes access to both federal and state courts. *Boling* v. *Natural Zinc Company,* 435 F. Supp. 18, 20 (1976). Having exhausted his administrative remedies, Petitioner had only one available means by which to redress his grievance and vindicate his wrong: access to a meaningful hearing in State Court, which was denied him.

CONCLUSION

For the reasons cited above, the petition for certiorari should be granted.

Respectfully submitted
W. Francis Marion
P.O. Box 2048
Greenville, SC 29602
Counsel of Record for Petitioner

Of Counsel,
Haynsworth, Perry, Bryant, Marion & Johnstone
P.O. Box 2048
Greenville, South Carolina 29602

1-A

APPENDIX

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James B. Gowan, ... *Appellant,*

v.

St. Francis Community Hospital, ... *Respondent,*

Appeal From Greenville County
James H. Price, Jr., *Judge*

Opinion No. 21274
Filed July 24, 1980

AFFIRMED

W. Francis Marion, Donald A. Harper and Frances D. Ellison, all of Haynsworth, Perry, Bryant, Marion & Johnstone, of Greenville, *for appellant.*

William W. Kehl, of Wyche, Burgess, Freeman & Parham, of Greenville, *for respondent.*

PER CURIAM: Appellant James B. Gowan, a licensed medical practitioner certified by the American Board of Family Physicians, was denied certain specialized privileges by respondent St. Francis Community Hospital, a private corporation. This appeal is from the lower court's denial of injunctive relief sought by appellant. We affirm.

A private hospital is free to adopt reasonable regulations for the conduct of its affairs. *Fahey* v. *Holy Family Hospital,* 32 Ill. App. 3d 537, 336 N.E. 2d 309 (1975); accord, *Strauss* v. *Marlboro County General Hospital,* 185 S.C. 425, 194 S.E. 65 (1937). Here we are not persuaded respondent's implementation of such regulations to the restriction of appellant's

practice in its hospital requires us to depart from the long-standing principle that such action is not subject to judicial review. *Strauss, supra; Khan* v. *Suburban Community Hospital,* 45 Ohio St. 2d 39, 340 N.E. 2d 398 (1976); *Edson* v. *Griffin Hospital,* 21 Conn. Sup. 55, 144 A. 2d 341 (1958).

Accordingly, the judgment below is affirmed.

AFFIRMED.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

APPENDIX-B

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

James B. Gowan,
Plaintiff,

-vs-

St. Francis Community Hospital,
Defendant.

C. A. No. 77-CP-23-1293

ORDER

FILED AND ENTERED
CLERK OF COURT,
GREENVILLE COUNTY
Feb. 13, 3:09 P.M. 1979

Plaintiff, a physician duly licensed by the State of South Carolina, has brought this action against St. Francis Community Hospital (St. Francis) seeking an injunction prohibiting the Defendant Hospital from refusing to grant Plaintiff medical staff privileges in electrocardiography and in coronary care. Plaintiff possessed such privileges at St. Francis until his resignation in August of 1974. Upon his reapplication to the St. Francis Staff in March, 1977, the privileges were refused. The basis of Plaintiff's claim is an allegation that the rules on which the Hospital relied are unreasonable, arbitrary, discriminatory and capricious.

A hearing was held before me on January 29, 30 and 31 at which Plaintiff, the Administrator of Greenville Memorial Hospital, and four physicians testified on behalf of Plaintiff. The witnesses for Defendant included its Executive Director, the President of its Board of Managers, the President of its Medical Staff, the Chairman of its Credentials Committee, the Chairman of its Department of Internal Medicine and the Chairman of an ad hoc hearing committee which was convened to hear Plaintiff's appeal from the denial of privileges.

FINDINGS OF FACT

Based upon the testimony and exhibits presented to me, I make the findings of fact set forth hereinafter.

Defendant graduated from the Medical University of South Carolina in December 1956. Immediately thereafter, he served a one year rotating internship at Greenville General Hospital. In January 1958, Plaintiff began private practice in Greenville, South Carolina in partnership with an internist. He was admitted to the Medical Staffs of both Greenville General Hospital (now Greenville Hospital System) and St. Francis Community Hospital. In both Hospitals he possessed the privileges of reading and interpreting electrocardiograms (EKGs) and admitting patients to the Coronary Care Unit (CCU) without obtaining consultations.

In the early years of Plaintiff's practice, there were no rules at St. Francis Community Hospital or at Greenville Hospital System specifying the qualifications required for specific procedures. In 1968 and in 1973, the Greenville Hospital System revised its rules and established qualifications for exercising EKG and CCU privilege which Plaintiff did not meet. Exceptions to the rules were made, however, in Plaintiff's favor on both occasions and he continues to possess these privileges today.

At St. Francis Community Hospital, Plaintiff possessed both EKG and unrestricted CCU privileges continuously until his resignation from the Medical Staff in August of 1974. Upon his resignation, Plaintiff had no further relationship with St. Francis until he reapplied for staff privileges on March 21, 1977.

The records of the Greenville Hospital System show that Plaintiff admitted 102 patients to the Coronary Care Unit between 1968 and 1978. He interpreted in excess of 900 electrocardiograms at Greenville Hospital System between 1973 and 1978. In 1974, at St. Francis, prior to his resignation in August, Plaintiff admitted 82 patients to the Hospital, of which one was admitted to the Coronary Care Unit.

At the time of his resignation from St. Francis in 1974 Plaintiff was in practice by himself. At the time of his reapplication to St. Francis, he was in practice with several other physicians including two physicians with CCU privileges, one of whom is Board certified in internal medicine.

In late 1976 or early 1977, Dr. Lang, the incoming President of the Medical Staff, directed Dr. Young, the Chairman of the Department of Internal Medicine, to review the rules and regulations of his department in anticipation of the upcoming accreditation visit to St. Francis of the Joint Commission on Accreditation. The Coronary Care Unit rules and regulations then in effect provided that members of the Department of Medicine could admit patients to the CCU without obtaining a consultation but that others who admitted patients to the CCU must obtain a consultation from a member of the Department of Medicine. In early 1977 the rules of the Department of Medicine were revised to restrict membership in the Department to those who were certified by, or by reason of their training, eligible to be certified by, the American Board of Internal Medicine.

In January 1977, the CCU Committee began consideration of revising the CCU Rules to permit, in addition to members of the Department of Medicine, certain Family Practitioners, to admit to CCU without obtaining a consultation provided they presented evidence of (1) satisfactory completion of an approved three year residency in family practice, (2) completed during their residency a minimum of eight months in internal medicine, and (3) completed a minimum of two months with cardiologists assigned primarily to a CCU during their residency. This change in the CCU rules was considered by the CCU Committee at its January 25, 1977 meeting and was approved by the CCU Committee at its April 15 meeting. It was later approved by the Department of Medicine on April 19, by the Executive Committee of the Medical Staff on May 5, 1977 and by the Board of Managers on June 6, 1977.

Plaintiff was neither Board certified nor Board qualified in internal medicine. Although certified by the American Board of Family Practice, he had not completed an approved three year residency in family practice nor had he completed the required training in internal medicine or cardiology. Consequently, Plaintiff did not meet the requirements of the CCU rule in effect at the time he applied to be readmitted to the St. Francis Staff nor did he meet the standard of the revised CCU rules which were under consideration at the time his application was being processed.

At the time of Plaintiff's application there were no rules in effect at St. Francis relating to electrocardiography and consequently no standards for qualification as to who could interpret EKGs. Such rules were formulated after Plaintiff's application by Dr. Young, the Chairman of the Department of Medicine. The rules were considered contemporaneously with Plaintiff's application. In drafting the EKG rules, Dr. Young was guided by the EKG rules in force at Greenville Hospital System and by the rules at St. Francis for radiology and pathology privileges. Such rules required for eligibility for such privileges Board certification or qualification in internal medicine, radiology or pathology, respectively. Because he did not possess the requisite training to be eligible for Board certification in Internal Medicine, Plaintiff did not meet the requirement of the new EKG rule.

Plaintiff's application, which was filed on March 21, 1977, requested privileges in the Family Practice Department and additional privileges of EKG and CCU admitting without consultation. The Credentials Committee met on March 28, 1977 and recommended that Plaintiff be given privileges in the Department of Family Practice but referred to the CCU Committee the question of EKG and CCU privileges because EKG and CCU privileges were not customarily held by family practitioners.

On April 15, the CCU Committee considered Plaintiff's application and also gave final consideration to the EKG and CCU rules. The unanimous recommendation was to deny Plaintiff EKG and CCU privileges and to approve the EKG and CCU rules without modification or exception.

On April 19, the Department of Medicine gave final approval to the new CCU and EKG rules. The members of the Department discussed the effect of the new CCU and EKG rules on physicians then possessing or applying for privileges in these areas. It was pointed out that some physicians would no longer be qualified under the new rules. After discussion, it was decided that the rules should not be modified and Dr. Young was directed to contact those physicians adversely affected by the rules change.

Following the action of the Department of Medicine, Plaintiff wrote Dr. Young pointing out his years of practice with Dr. James Anderson, an internist, and his exercise of the CCU and EKG privileges at St. Francis previously and his current exercise of those privileges at Greenville Hospital System. He requested that consideration be given to those factors. These matters were reviewed by the CCU Committee on May 13 at a meeting called for that purpose. The CCU Committee declined to modify the rules in order to make provision for Plaintiff and the Credentials Committee was informed of this decision.

On May 23, the Credentials Committee met and forwarded to the Executive Committee of the Medical Staff its recommendation that Plaintiff be denied CCU and EKG privileges. The Executive Committee met on June 2 and approved Plaintiff's appointment to the Medical Staff in the discipline of Family Practice but recommended that CCU and EKG privileges be denied. This action became final on June 6, 1977 when the Board of Managers of St. Francis gave final approval to the new rules and to the action of the Medical Staff regarding Plaintiff's application.

After the final action of the Board of Managers, Plaintiff requested and received a hearing before an Ad Hoc Hearing Committee of the Medical Staff. Plaintiff appeared before the Hearing Committee on July 11 and made both oral and written presentations. The Committee considered all the information presented to it. No evidence was offered but refused consideration. At the conclusion of the hearing the unanimous decision of the Hearing Committee was to recommend to the Executive Committee that the adverse decision of the Board of Managers be upheld.

Plaintiff, as permitted by the Medical Staff Bylaws, requested and was given an appellate review by the Board of Managers. The Board met on August 31. Plaintiff appeared in person at the Board hearing and was represented at the hearing by his attorney. Both Plaintiff and his attorney made presentations to the Board. At the conclusion of the hearing the Board decided unanimously to deny Plaintiff's appeal. Mr. Robert Crawford, the Chairman of the Board of Managers, stated in testimony that the Board felt it had an obligation to provide highest level of care possible in the Hospital. He viewed the rules against the ample number of Board certified or eligible physicians in the Department of Medicine and concluded that it was reasonable to upgrade the standard for EKG and CCU privileges. He also testified that he and the Board made inquiry to determine that the rule was not intended to discriminate against Plaintiff but to upgrade standards in the Hospital in order to continue to obtain accreditation from the Joint Commission on Accreditation. All witnesses conceded Plaintiff's competence as a physician. No criticism of his professional ability as a clinician was voiced. In fact, he was described as an excellent clinician.

Several witnesses, both those called by Plaintiff and those called by Defendant, testified to their understanding of a trend in the medical profession to upgrade standards and to increasingly rely on the possession of approved formal train-

ing and residencies as indicators of professional competence. The accreditation goal of upgrading the level of care was recognized by more than one witness.

Despite the denial of CCU and EKG privileges, Plaintiff still has the privilege of practicing at St. Francis Hospital as a member of the Department of Family Practice. He can also continue to admit patients to the Coronary Care Unit at St. Francis and follow their care as long as he obtains consultation from a physician whose practice is more specialized. He, of course, continues to possess these privileges at Greenville Hospital System.

CONCLUSIONS OF LAW

The parties are in sharp disagreement as to whether the Court can review the administrative action of the Medical Staff and Hospital in denying EKG and CCU privileges to Plaintiff and the standard to be applied in doing so. It is clear that the Defendant is a private hospital, chartered as a nonprofit eleemosynary corporation under the laws of the State of South Carolina. Its affairs are managed by a Board of Directors in conformity with the Canon Laws of the Roman Catholic Church, the Constitution of the Congregation of the Franciscan Sisters of the Poor and with the ethical and religious directives for Catholic health facilities. Its operations are financed by the charges it makes for its services. Plaintiff contends that the receipt of substantial Hill-Burton Act and Appalachian Development Act funds at the time of construction together with the receipt of Medicare and Medicaid reimbursement permits the Court to review the administrative decisions of the Hospital to determine if they are arbitrary, capricious or unreasonable or violate federal constitutional mandates. See *Sams* v. *Ohio Valley General Hospital Association*, 413 F.2d 826 (4th Cit. 1969) and *Silver* v. *Castle Memorial Hospital*, 497 P.2d 564, motion den., 501 P.2d 60, *Cert. denied*, 409 U.S. 1048 (1972). Defendant contends that

receipt of substantial public or federal funds does not change the general rule that a Court may not review the administrative acts of a private hospital. See *Ronca City Hospital, Inc.* v. *Murphree*, 545 P.2d 738 (Okla. 1976); *Khoury* v. *Community Memorial Hospital, Incorporated*, 123 S.E.2d 533 (Va. 1962); *Edson* v. *The Griffen Hospital*, 144 A.2d 341 (Conn. 1958). In addition, Defendant contends that *Strauss* v. *Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937) and *The Trustees of Columbia Academy* v. *The Board of Trustees of Richland County School District No. 1*, 262 S.C. 117, 202 S.E. 2d 860 (1974) place South Carolina among the states which will not permit review.

In view of my conclusion, however, I need not determine the extent to which the South Carolina Supreme Court would permit judicial review and the standard which it would employ. Even accepting Plaintiff's contention that the Court should review the Hospital action if it was arbitary, capricious or unreasonable, I find that no act of the Defendant was arbitrary, capricious or unreasonable.

It has long been held that a doctor has no constitutional right to staff privileges of a hospital merely because he is licensed to practice medicine. *Hayman* v. *Galveston*, 273 U.S. 414 (1927). The Fifth Circuit Court of Appeals has recently observed:

> Those cases make clear that the decision of a hospital's governing body concerning the granting of hospital privileges is to be accorded great deference. This is so because of the court's obvious lack of medical expertise. Judicial intervention must be limited to an assessment of those factors which are within the court's expertise to review. For this reason our courts have gone no further than to require that the procedures employed by the hospital are fair, that the standards set by the hospital are reasonable, and that they have been applied without arbitrariness and capriciousness.
>
> *Laje* v. *R. E. Thomason General Hospital*, 564 F.2d 1159, 1162.

The Bylaws of St. Francis placed final responsibility for staff appointments and granting of practice privileges upon the Board of Managers. The Board, following a departmental recommendation and approval by the Executive Committee of the Medical Staff adopted a rule that required that EKG interpretation be limited to physicians Board certified or Board qualified in Internal Medicine. It also adopted a rule that required physicians admitting patients to the Coronary Care Unit to obtain a consultation unless they possessed certain specialized training.

These rules apply uniformly to all physicians on the Staff of St. Francis. As a result of the adoption of the rule other physicians at St. Francis lost CCU and EKG privileges. Several witnesses testified, and I find, that the rules are reasonable and reasonably related to the Hospital goals of upgrading its standards and acquiring and maintaining the accreditation of the Joint Commission on Accreditation.

The rules were similar to those at Greenville Hospital System and are consistent with the standards which were recognized as prevailing within the medical profession. Where there are ample physicians with specialized training, it is not unreasonable to require that the most qualified perform special procedures.

It is the Board and not the Court which is charged with the responsibility of providing a staff of competent physicians, moreover the Board is responsible for upgrading the standard of health care within the hospital. See *Kahn* v. Suburban Community Hospital, 45 Ohio St.2d 39, 340 N.E.2d 398 (1976), *Darling* v. *Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253, *cert. den.*, 383 U.S. 946. The Board has chosen to rely on the advice of its Medical Staff in discharging this responsibility. During the course of the adoption of the rules and the consideration of Plaintiff's application, in excess of 50 physicians on the staff of St. Francis gave consideration to Plaintiff's request for CCU and

EKG privileges and his contention that the rules should not be applied against him. Only one physician voted in support of Plaintiff's application for EKG and CCU privileges. In view of the virtual unanimity of the Medical Staff, this Court is not prepared to substitute its judgment for that of the Medical Staff which, in my opinion, acted reasonably in support of an appropriate goal, that of upgrading the standards of health care in the Hospital. No evidence was presented to support a finding of arbitrariness or capriciousness in dealing with Plaintiff. The fact that Greenville Hospital System has chosen to exempt Plaintiff from its rules which are similar to Defendant's, does not give Plaintiff a vested right to the same privileges at St. Francis.

Plaintiff has contended that because he has exercised EKG and CCU privileges previously at St. Francis without criticism or censure, the Board acted unreasonably in failing to except him from the application of the rule. Previous cases have made clear the authority of a hospital to adopt higher standards for specialized procedures thereby excluding those who previously exercised such privileges. In *Kahn* v. *Suburban Community Hospital, supra,* a physician who had possessed general surgical procedures at the defendant hospital for four years had his privileges reduced from major surgical privileges to minor privileges as the result of the adoption of a new rule which required Board certification or eligibility. The trial court in that case had erroneously concluded that "There is no better test of competence than performance itself. Dr. Kahn is legally licensed to perform general surgery and did so completely at Defendant Hospital for approximately four years. To exclude him from further practice merely because he has not attained membership in certain medical organizations is arbitrary, capricious and unreasonable." This holding was reversed on appeal by the Supreme Court of Ohio, which noted that the Board was responsible for providing a staff of competent physicians and for upgrading standards of health care. The Court there held:

> Finally, it is not arbitrary, capricious or unreasonable to exclude a physician from practicing a specialty in a private hospital where he has been unable to meet any of the professionally approved criteria adopted by the hospital's board of trustees for practicing the specialty.
>
> To require Dr. Kahn to meet the standards required of all physicians on the hospital staff cannot be arbitrary, capricious or unreasonable.
> 340 N.E.2d at 403.

Of similar effect is *Edson* v. *The Griffin Hospital*, 21 Conn. Supp. 55, 144 A.2d 341 (1958), in which the plaintiff, a general practitioner, after possessing major surgical privileges for 15 years, lost surgical privileges as the result of a new rule which limited such privileges to those Board certified or eligible in surgery. The Court said:

> Standards had to be upgraded. General practitioners for the most part had to limit their surgery and give way to those who had special training and were certified as Diplomates of the American Board or those who had qualified in their specialty but who had not as yet been certified. The problem was one of special training in a limited field.
>
> 144 A.2d at 346.

Finally, *Fahey* v. *Holy Family Hospital*, 32 Ill. App.3d 537, 336 N.E.2d 309, presented a question quite similar to the case at bar. Dr. Fahey was a Board certified surgeon who had possessed unlimited surgical privileges at the defendant hospital for 11 years. When he had been on the staff for nine years, the Board adopted a rule for its obstetrics and gynecology department which required any physician not a member of that department to consult with one of its qualified members

before any gynecological operation was performed. After appeal the Board granted him an exemption from the rule. Two years later the exemption was withdrawn. Dr. Fahey pointed to his impeccable qualifications, his 11 years of staff membership and more than 1,000 gynecologic surgeries performed without consultation and argued that the rule was arbitrary and unreasonable as applied to him and that the rule was not required in order to improve patient care. The Court held that the hospital, acting through its governing Board, had the authority to adopt the rule and remove the exemption.

It should also be noted that Plaintiff's ability to practice medicine and to admit patients to St. Francis has not been interfered with by the denial of EKG and CCU privileges. He still has all the privileges at St. Francis of a licensed physician. He can continue to admit patients to CCU so long as he obtains the necessary consultation which can be provided by two of his partners. It appears that in the past the majority of Plaintiff's patients were not admitted to the CCU and there is, of course, no change in his relationship with such patients.

In the absence of any showing of substantial affect upon his ability to practice medicine at St. Francis or in the Greenville community, there is no basis for a finding of irreparable injury which is an essential element in this type of action.

In summary, I conclude that Defendant had authority to adopt the new rules and apply them against Plaintiff, that the rules are reasonable in their application to Plaintiff, that Plaintiff was accorded due process in the denial of his application for CCU and EKG privileges and his appeal therefrom, and that Plaintiff has not shown irreparable injury to his medical practice.

Accordingly, I find that Plaintiff is not entitled to injunctive relief against Defendant.

IT IS SO ORDERED.

CIRCUIT JUDGE

Greenville, South Carolina

Dated: 13 February, 1979

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APPENDIX-C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James B. Gowan,
Appellant,

-vs-

St. Francis Community Hospital,
Respondent.

Opinion No. 21274

Filed July 24, 1980

Judgment Entered
August 6, 1980

The judgment sought to be reviewed is the opinion of the South Carolina Supreme Court, No. 21274, *infra.* at page 2-A.